

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR
REGION 10

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IN THE MATTER OF:)	Docket No. 10-95-0039 OPA
)	
JOE C CORPORATION and)	Proceeding to Assess
MICHAEL T. BANKS,)	Class I Administrative
Huntington Beach, CA)	Penalty Under Clean Water
)	Act Section 311,
RESPONDENTS)	33 U.S.C. §1321
)	
)	

DECISION AND ORDER OF THE REGIONAL ADMINISTRATOR

This is a proceeding for the assessment of a Class I administrative penalty under Section 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. §1321(b)(6)(B)(i). The proceeding is governed by the Environmental Protection Agency's Proposed 40 C.F.R. Part 28 -- Consolidated Rules of Practice Governing the Administrative Assessment of Class I Civil Penalties Under the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Emergency Planning and Community Right-to-Know Act, and the Administrative Assessment of Civil Penalties Under Part C of the Safe Drinking Water Act, 56 Fed. Reg. 29,996 (July 1, 1991), issued October 29, 1991 as procedural guidance for Class I administrative penalty proceedings under Section 311 of the Clean Water Act, 33 U.S.C. §1321, (the "Consolidated Rules").

This is the Decision and Order of the Regional Administrator under § 28.28 of the Consolidated Rules.

STATUTORY BACKGROUND

The objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Subsection 101(a) of the Clean Water Act, 33 U.S.C. § 1251(a). One key provision of the Act is the prohibition on unauthorized discharges of oil and hazardous substances:

The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, . . . in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited"

Subsection 311(b)(3) of the Clean Water Act, 33 U.S.C. § 1321(b)(3).

Section 311(b)(6)(A) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(A), provides for Class I or Class II administrative enforcement actions against any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility from which oil or a hazardous substance is discharged in violation of subsection 311(b)(3), 33 U.S.C. § 1319(b)(3). Before assessing a Class I civil penalty, the Administrator must give the person to be assessed such penalty written notice of the proposed penalty and the opportunity to request, "within 30 days of the date the notice is received by such person," a hearing on the proposed penalty. Subsection 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(i) (emphasis added).

PROCEDURAL BACKGROUND

The Program Manager of the Response and Investigations Branch of the Hazardous Waste Division of Region 10 of the United States Environmental Protection Agency (Complainant) initiated this action on March 20, 1995, by issuing to Joe C Corporation and Michael T. Banks (Respondents) an administrative complaint under Section 28.16(a) of the Consolidated Rules. After two attempts to serve the administrative complaint by certified mail, the administrative complaint was served personally on Michael T. Banks, President of Joe C Corporation, on June 24, 1995 in Huntington Beach, California. Exhibits A, B, and C to EPA's Motion to Supplement Administrative Record dated August 23, 1995.

The administrative complaint contained recitations of statutory authority and allegations regarding Respondents' discharge of oil from the Tugboat Joe C into or upon the Duwamish River in a manner alleged to be in violation of the Clean Water Act. The administrative complaint provided notice of a proposed penalty in the amount of \$5,000. The letter accompanying the administrative complaint provided notice that failure to respond to the administrative complaint within thirty days would result in the entry of a default order, and informed Respondents of their right to a hearing and of the opportunity to seek an extension of the thirty day period for filing a response.

By memorandum dated June 20, 1995, the Regional Counsel for EPA Region 10 designated Steven W. Anderson as Presiding Officer

in this proceeding pursuant to § 28.16(h) of the Consolidated Rules.¹

Under Section 28.20 of the Consolidated Rules, Respondents had thirty days from receipt of the administrative complaint to file a response, unless the deadline was extended under Section 28.20(b)(1) for the purpose of engaging in informal settlement negotiations.

The initial deadline under Section 28.20(a) for filing a response was July 24, 1995. The Record does not contain any stipulations extending the response deadline as allowed under Section 28.20(b)(1).

No response has been filed to date by either of the Respondents. Both Respondents have therefore failed to respond to the administrative complaint in a timely fashion.

On September 8, 1995, the Presiding Officer issued an Order to Show Cause to the Respondents, allowing them until September 29, 1995 to file a written explanation of the circumstances or reasons surrounding the Respondents' apparent failure to file a timely response. The Respondents did not respond to the Order.

As a consequence of the failure to file a timely response to the administrative complaint, each Respondent has waived its opportunity to appear in this action for any purpose. See Section 28.20(e) of the Consolidated Rules. Respondents' failure to file a timely response to the administrative complaint also

¹ The previously designated Presiding Officer retired on June 29, 1995.

automatically triggers the default proceedings provision of the Consolidated Rules. Section 28.21(a) of the Consolidated Rules provides:

Determination of Liability. If the Respondent fails timely to respond pursuant to §28.20(a) or (b) of this Part . . . the Presiding Officer, on his own initiative, shall immediately determine whether the complainant has stated a cause of action.

By Order dated November 6, 1995 the Presiding Officer determined that the Complainant had stated a cause of action in the administrative complaint. In the same Order the Regional Hearing Clerk was directed to enter Respondents' default as to liability in the record of the proceeding as required by §28.21(a)(1) of the Consolidated Rules and Complainant was directed to submit a written argument regarding assessment of an appropriate civil penalty in accordance with § 28.21(c) of the Consolidated Rules. Counsel for Complainant filed the written argument as directed and that submission has been included in the administrative record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under § 28.21(a)(1) of the Consolidated Rules, upon entry of Respondent's default as to liability, the allegations as to liability included in the administrative complaint are deemed recommended findings of fact and conclusions of law. Accordingly, I accept those allegations and make the following Findings of Fact and Conclusions of Law:

(1) Respondent, Michael T. Banks, is a person residing at 3272 Easter Circle, Huntington Beach, California 92649.

Respondent, Joe C Corporation, is a corporation organized under the laws of California with the last known place of business located at 3272 Easter Circle, Huntington Beach, California 92649.

(2) Respondent, Michael T. Banks, is the person in charge and/or operator of a vessel within the meaning of Section 311(a)(3) of the Clean Water Act, 33 U.S.C. §1321(a)(3) and 40 C.F.R. §112.2, which is located at KENCO Marine Shipyard on the Duwamish River, in Seattle, Washington ("facility"). Respondent, Joe C Corporation, is a person which owns a vessel within the meaning of Section 311(a)(3) of the Clean Water Act, 33 U.S.C. §1321(a)(3) and 40 C.F.R. §112.2, which is located at KENCO Marine Shipyard on the Duwamish River, in Seattle, Washington ("facility").

(3) Section 311(b)(3) of the Act prohibits the discharge of oil into or upon the navigable waters of the United States or adjoining shorelines in such quantities that have been determined may be harmful to the public health or welfare or environment of the United States.

(4) For purposes of Section 311(b)(3) and (b)(4) of the Act, 33 U.S.C. §1321(b)(3) and (b)(4), discharges of oil into or upon the navigable waters of the United States in such quantities that have been determined may be harmful to the public health or welfare or environment of the United States are defined in 40

C.F.R. §110.3 to include discharges of oil that (1) violate applicable water quality standards or (2) cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shorelines.

(5) On July 18 and 19, 1994, Respondents discharged 700 gallons of oil as defined in Section 311(a)(1) of the Act, 33 U.S.C. §1321(a)(1), and 40 C.F.R. §110.1, from its facility, Joe C Tugboat, into or upon the Duwamish River.

(6) The Duwamish River is a water of the United States as defined in Section 502(7) of the Clean Water Act, 33 U.S.C. §1362(7), and 40 C.F.R. §110.1.

(7) Respondents' July 18 and 19, 1994, discharge of oil from its facility, Joe C Tugboat, caused a sheen upon or discoloration of the surface of the Duwamish River and/or a sludge or emulsion to be deposited beneath the surface of the Duwamish River, and, therefore, was in a quantity that has been determined may be harmful under 40 C.F.R. §110.3, which implements Sections 311(b)(3) and (b)(4) of the Act.

(8) Respondents' July 18 and 19, 1994, discharge of oil from its facility, Joe C Tugboat, into or upon the Duwamish River in a quantity that has been determined may be harmful under 40 C.F.R. §110.3 violated Section 311(b)(3) of the Act. Pursuant to Section 311(b)(6)(B)(i) of the Act, the Respondents are liable for civil penalties of up to \$10,000 per violation, up to a maximum of \$25,000.

DETERMINATION OF REMEDY

In accordance with Section 28.21(b) of the Consolidated Rules and the Presiding Officer's Order of November 6, 1995, Complainant has submitted a written argument regarding the assessment of an appropriate civil penalty.²

Based upon the administrative record, I have taken into account the following matters in determining an appropriate civil penalty:

The seriousness of the violation or violations: The violation involved the discharge of approximately 700 gallons of bilge waste oils, lube oils, and diesel oil from the Tugboat Joe C ("Joe C") into or upon the Duwamish River on July 18 and 19,

²The Complainant's arguments are categorized in terms of the factors to be considered in determining the amount of a penalty assessed under Subsection 309(g)(3) of the Clean Water Act, 33 U.S.C. §1319(g)(3), as specified in Section 28.21(b)(1) of the Consolidated Rules.

In fact, Section 28.21(b)(2) of the Consolidated Rules specifies the penalty factors which Complainant is to address in a default proceeding under Section 311 of the Clean Water Act, 33 U.S.C. §1321:

The argument shall be limited to the seriousness of the violation or violations, the economic benefit to the violator, if any, resulting from the violation, the degree of culpability involved, any other penalty for the same incident, any history of prior violations, the nature, extent and degree of success of any efforts of the violator to minimize the effects of the discharge, the economic impact of the penalty on the violator, and any other matters as justice may require.

Although the Complainant miscategorized its arguments regarding penalty, it addressed each of the factors specified in Section 28.21(b)(2) in its written argument.

1994, when the Joe C sank at its moorings. After sinking, the Joe C sat partially submerged for approximately four days. Due to the Joe C's poor condition and bad state of repair, dewatering efforts were not successful until a diver identified the points of water entry and the EPA response team could repair the holes sufficiently to stop the inflow of water. See Complaint and Exhibits A and B to Complainant's Argument Regarding Appropriate Penalty Amount.

The Duwamish River is tidally-influenced at the point at which the Joe C sank, with intertidal areas along the banks that support sensitive plant and animal habitat. The Duwamish River supports a variety of marine plant and animal species, including anadromous fish. Due to the amount of oil discharged, the discharge may have significantly affected navigable waters, shorelines of the Duwamish River, vegetation along the river, and animals living in and along the river. The discharge resulted in floating oil and oiled debris on the Duwamish River. See Exhibit A to Complainant's Argument Regarding Appropriate Penalty Amount. Oils of the type discharged from the Joe C typically contain organosulfur compounds in addition to high molecular weight hydrocarbons. Oil is harmful to benthic organisms and marine plant and animal life. See Exhibit C to Complainant's Argument Regarding Appropriate Penalty Amount.

If not for the federal response, more oil could have been discharged from the engine and fuel tanks of the Joe C. Approximately 2100 gallons of oily waters were removed from the

vessel during the response action. See Complaint and Exhibits A and B to Complainant's Argument Regarding Appropriate Penalty Amount.

The economic benefit to the violator, if any, resulting from the violation: Respondents' evident neglect of maintenance for the Joe C would logically have resulted in an economic savings to the Respondents in the amount that it would have cost Respondents to maintain the vessel properly. The record contains no information that would quantify such savings.

The Respondents failed to respond to the oil spill, resulting in savings approximately equal to the costs incurred by the EPA response team in raising the Joe C and cleaning up the discharged oil. The Oil Spill Liability Trust Fund incurred approximately \$64,000 in costs related to the Joe C. See Exhibit A (Attachment I) to Complainant's Argument Regarding Appropriate Penalty Amount. There is nothing in the record to indicate that the Respondents have reimbursed the Trust Fund for those costs.

The degree of culpability involved: Respondents' conduct reflects a high degree of culpability. Respondent Mr. Banks and Respondent Joe C Corporation negligently maintained the Tugboat Joe C. The lack of proper maintenance and repair caused the Joe C to sink, which resulted in the discharge of oil to the Duwamish River. See Exhibit A to Complainant's Argument Regarding Appropriate Penalty Amount. The record contains no indication that Respondents have ever taken steps to accept responsibility for the oil spill. Numerous attempts by the Coast Guard and EPA

to contact Mr. Banks were unsuccessful. Mr. Banks never appeared on the scene while the response action was taking place, and never took any steps to mitigate the harm posed by the discharge of oil from the sunken vessel. See Exhibit A to Complainant's Argument Regarding Appropriate Penalty Amount.

Any other penalty for the same incident: The record does not contain any information to indicate that Respondents have been assessed or have paid any other penalty for this incident.

Any history of prior violations: The record contains no evidence of any prior violations of the Clean Water Act by the Respondents.

The nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge: Numerous attempts by the Coast Guard and EPA to contact Mr. Banks by telephone were unsuccessful. Mr. Banks is the registered agent for service for Joe C Corporation. A Notice of Federal Interest was mailed to Mr. Banks' residence by certified mail, and a copy was hand-delivered to his son. Mr. Banks never appeared on the scene while the response action was taking place, never took any steps to mitigate the harm posed by the discharge of oil from the sunken vessel, and never contacted EPA. See Exhibit A to Complainant's Argument Regarding Appropriate Penalty Amount.

The economic impact of the penalty on the violator: There is limited information in the record concerning Respondents' ability to pay a penalty.

The Joe C Corporation may have been formed solely to hold title to the Tugboat Joe C; the Joe C may therefore be its only asset. See Exhibits B and D to Complainant's Argument Regarding Appropriate Penalty Amount.

Mr. Banks is delinquent in paying \$45,000 in moorage fees at KENCO marine shipyard. A credit report on Mr. Banks lists numerous liens and collection accounts, and shows a pattern of delinquent payments. See Exhibit B to Complainant's Argument Regarding Appropriate Penalty Amount.

Complainant infers from this record that Respondents may not have substantial financial resources at this time. However, Mr. Banks or corporations in which he is an officer and/or director owned up to six vessels in the recent past, including the Joe C. See Exhibit B to Complainant's Argument Regarding Appropriate Penalty Amount. These assets, to the extent they are still available to Respondents, may have some realizable value. Given the relatively small size of the penalty at issue, I am satisfied that Respondents are able to pay a civil penalty.

Any other matters as justice may require: Respondents may be deterred from future violations by the assessment of a penalty. Other persons will be deterred from similar violations by assessment of a penalty in this case. In particular, assessment of a penalty for the violations involved in this action may encourage Respondents and others similarly situated to properly maintain and repair vessels under their control and thus prevent oil spills of the type which occurred in this case.

Accordingly, based upon the administrative record and the applicable law, I determine a civil penalty of \$5,000 is appropriate in this case.

ORDER

On the basis of the administrative record and applicable law, including § 28.28(a)(2)(ii) of the Consolidated Rules, Respondents are hereby ORDERED to comply with all of the terms of this ORDER:

A. Respondents are hereby assessed a civil penalty in the amount of \$5,000 and ORDERED to pay the civil penalty as directed in this ORDER.

B. Pursuant to § 28.28(f) of the Consolidated Rules, this ORDER shall become effective 30 days following its date of issuance unless the Environmental Appeals Board suspends implementation of the ORDER pursuant to § 28.29 of the Consolidated Rules (relating to Sua Sponte review).

C. Respondents shall, within 30 days after this ORDER becomes effective, forward a cashier's check or certified check, payable to "Treasurer, United States of America," in the amount of \$5,000. Respondents shall mail the check by certified mail, return receipt requested, to:

United States Environmental Protection
Agency
Regional Hearing Clerk - Region X
P.O. Box 360903M
Pittsburgh, PA 15251

In addition, Respondents shall mail a copy of the check, by first class mail, to:

Regional Hearing Clerk (SO-155)
United States Environmental Protection
Agency - Region X
1200 Sixth Avenue
Seattle, WA 98101

D. In the event of failure by Respondents to make payment within 30 days of the date this ORDER becomes effective, the matter may be referred to the United States Attorney for collection by appropriate action in the United States District Court pursuant to subsection 309(b)(6)(H) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(G).

E. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty if it is not paid as directed. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. § 102.13(c). A late payment handling charge of twenty (\$20) dollars will be imposed after 30 days, with an additional charge of ten (\$10) dollars for each subsequent 30-day period over which an unpaid balance remains.

In addition, a penalty charge of 6 percent per year will be assessed on any portion of the debt which remains delinquent more than 90 days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due under 4 C.F.R. § 102.13(e).

JUDICIAL REVIEW

Respondents have the right to judicial review of this ORDER. Under subsection 311(b)(6)(G)(i) of the Clean Water Act, 33 U.S.C. §1321(b)(6)(G)(i), Respondents may obtain judicial review of this civil penalty assessment in the United States District Court for the District of Columbia or in the United States District Court for the District in which the violation is alleged to have occurred by filing a notice of appeal in such court within the 30-day period beginning on the date this ORDER is issued (5 days following the date of mailing under § 28.28(e) of the Consolidated Rules) and by simultaneously sending a copy of such notice by certified mail to the Administrator and to the Attorney General.

IT IS SO ORDERED.

Date: MAR 20 1996


Chuck Clarke
Regional Administrator

Prepared by: Steven W. Anderson, Presiding Officer.

CERTIFICATE OF SERVICE

In the Matter of: Joe C Corporation and Michael T. Banks.
Docket No. 10-95-0039-OPA, I hereby certify that a copy of
DECISION AND ORDER OF THE REGIONAL ADMINISTRATOR was sent this
day by the method indicated to the following:

Lori Houck, Esq.
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101

Handcarried

Steven W. Anderson
Regional Judicial Officer
U.S. EPA, Region 9
75 Hawthorne Street (RC-1)
San Francisco, California 94105-3901

Regular Mail

and the original was hand delivered to:

Mary A. Shillcutt
Regional Hearing Clerk
U.S. EPA, Region 10
1200 Sixth Avenue
Seattle, Washington 98101

Dated: March 21, 1996

Gregory Sippy
Gregory Sippy
Environmental Protection Agency